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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STEVEN NORMAN MAIKOWSKI, Appellant.	2 CA-CR 2009-0288 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20081694

Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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E S P I N O S A, Judge.

¶1 After a jury trial, Steven Maikowski was convicted of attempted second-degree murder, and three counts of aggravated assault, domestic violence. The trial court

imposed concurrent, aggravated prison terms, the longest of which was fifteen years. On appeal, Maikowski argues the court erred by excluding certain evidence and erroneously instructing the jury on the offense of attempted second-degree murder. For the following reasons, we affirm in part, vacate in part, and remand this matter for further proceedings.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). Maikowski lived with his girlfriend C. in her travel trailer in Tucson. Occasionally others would camp on the property with the couple's permission, including S. who, for a number of months, "exchanged labor" for a place to stay. One evening in April 2008, while Maikowski, C., S., and others were drinking near the trailer, Maikowski and C. had an argument. C. and S. went into the trailer, and Maikowski remained outside. When Maikowski later tried to enter, C. refused to let him in, apparently at S.'s prompting. Maikowski thereafter grew extremely upset when he saw C. sitting on S.'s lap through the trailer's window. C. eventually let Maikowski in and then "fell asleep right away." S. remained inside, apparently also falling asleep in the living room near C. It is unclear what Maikowski did while C. and S. slept.

¶3 C. awoke sometime later to the sound of "things being slammed around." She went to the kitchen and saw S. on the floor, face down, with blood around his ears and neck, and Maikowski "just standing there," "looking at the floor." S. eventually got up and walked out of the trailer, disoriented and holding his head, and C. stood in the

doorway to prevent Maikowski from following. C. noticed Maikowski was using a rag to wrap what she believed to be a hatchet. She then tried to grab the hatchet, sustaining some cuts on her hands. Maikowski told C. he was "very jealous" and "he could finish [S.] off . . . [a]nd bury him in the river." He added, "[N]o one will ever know. And then we can leave."

¶4 Police later found S. "sitting in [a] parking lot . . . bleeding from the ears" with "blood about his face and hands." He was taken to the hospital where it was determined he had life-threatening injuries, including an epidural hematoma and multiple skull fractures.

¶5 Maikowski was charged with attempted first-degree murder; aggravated assault, deadly weapon/dangerous instrument, domestic violence; aggravated assault, serious physical injury, domestic violence; and aggravated assault, temporary/substantial disfigurement, domestic violence. A jury convicted him of attempted second-degree murder as a lesser-included offense of attempted first-degree murder, and all three aggravated-assault counts. He was sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Evidentiary Rulings

Limitation on Cross-Examination

¶6 Maikowski first argues the trial court erred in limiting the scope of his cross-examination of C. to exclude certain evidence about her mental-health history. Arizona allows "a broad scope of cross-examination, the unreasonable limitation of

which will normally result in a reversal." *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985). But we "'will not reverse the [trial] court's rulings on issues of the relevance and admissibility of evidence absent a clear abuse of its considerable discretion.'" *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002), *quoting State v. Alatorre*, 191 Ariz. 208, 211, 953 P.2d 1261, 1264 (App. 1998) (alteration in *Davis*).

¶7 Before trial, the court limited the scope of cross-examination to preclude Maikowski from questioning C., who has bipolar disorder, about an "episode" a month before the assault in which she "was taken in off the street" and transported to the hospital due to "a panic or an anxiety attack." The court did, however, permit Maikowski to elicit testimony that C. had not been taking her prescribed medications at the time of the assault. Nevertheless, Maikowski maintains it was crucial to his defense that he be permitted to cross-examine C. about the earlier incident because it related to "her mental illness and how it manifested itself." We disagree.

¶8 Maikowski apparently sought to question C. about her prior hospitalization to show her memory of the assault might have been unreliable. But during Maikowski's cross-examination, of C. she agreed she had a "mental health diagnosis" for which she took medication and admitted she had not been taking the medication at the time of the assault. She further admitted she had been drinking that night and also using crack cocaine "[o]ff and on." This testimony provided the jury with ample evidence from which it could infer C.'s perception and memory of the assault were affected; thus,

evidence of a collateral hospitalization a month before the assault could be excluded appropriately under Rule 403, Ariz. R. Evid. We find no abuse of discretion.

¶9 Maikowski additionally asserts the trial court's ruling violated his due process and confrontation rights under the Arizona and United States Constitutions. *See* U.S. Const. amends. V, VI, and XIV, § 1; Ariz. Const. art. II, § 4. As the state points out, however, Maikowski forfeited review of these arguments for all but fundamental, prejudicial error because he did not raise them below. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object at trial to alleged error forfeits review for all but fundamental, prejudicial error). And even if the arguments were not forfeited, they have no merit because, as explained above, the court did not abuse its discretion in excluding the evidence of C.'s prior hospitalization. *See Davis*, 205 Ariz. 174, ¶ 33, 68 P.3d at 132 ("[A] defendant's constitutional rights are not violated where . . . evidence has been properly excluded."). Maikowski's constitutional arguments, therefore, do not provide grounds for reversal.

¶10 Maikowski also contends the trial court erred in preventing him from cross-examining C. about her prior statements that she had been confused on the night of the assault. But we agree with the state that this argument misstates the court's ruling. At the motions hearing, Maikowski's counsel described the statements along with other evidence he sought to use for impeachment. As noted above, the court excluded evidence about C.'s prior hospitalization but permitted Maikowski to question C. about all the other issues he had argued that day, including C.'s statements that she was confused:

> The parts that you just sort of summarized for the Court, that she was supposed to be taking medication but wasn't, that whole litany that you just summarized[—]I'm going to permit you to ask her that on cross[-]examination if she testifies.

Maikowski does not cite any portion of the record where the court prevented him from asking C. about her prior statements, nor do we find any.[1] Accordingly, this argument is without merit.

Witness's Mental-Health Records

¶11 Maikowski further contends the trial court erred in precluding him from obtaining and reviewing C.'s mental-health records after the court had reviewed them *in camera*. We review that ruling for an abuse of discretion. *See State v. Tyler*, 149 Ariz. 312, 314, 718 P.2d 214, 216 (App. 1986).

¶12 Maikowski relies on *State ex rel. Romley v. Superior Court*, 172 Ariz. 232, 836 P.2d 445 (App. 1992), to support his argument that he was entitled to C.'s records. In *Romley*, this court determined that the defendant could be entitled to disclosure of the victim's psychological records, but only after the trial court had made specific findings about "which portions of the medical records, if any[, we]re essential to the presentation of the defense of self-defense" and "which portions . . . , if any, [we]re essential to the determination of the ability of the victim to perceive, recall, and/or accurately relate the events of the day in question." *Id.* at 235, 836 P.2d at 448. The court further ordered that only the portions of the medical records "essential under th[ose] findings" were to be

[1]We remind counsel of the obligation under Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., to include citations to the parts of the record relied on. *See Ramirez v. Health Partners of S. Ariz.*, 193 Ariz. 325, n.2, 972 P.2d 658, 659 n.2 (App. 1998).

made available to the defense. *Id.* The present case is distinguishable because the trial court determined C.'s records contained no exculpatory evidence or material appropriate for impeachment, and, after reviewing them, we cannot say the court abused its discretion in reaching that conclusion. *Cf. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d at 131 (rulings on relevance of evidence reviewed for abuse of discretion). Accordingly, *Romley* does not require their disclosure.[2] *See id.*

¶13 Rather, we find this case to be more like *Tyler*, in which this court found no error when, after an *in camera* inspection, the trial court declined to provide the defense with a key witness's medical records. 149 Ariz. at 314, 718 P.2d at 216. There, as here, the witness disclosed his illness in a defense interview, and the defendant was permitted to cross-examine him about the effects on his memory of the illness and medications required to treat it. *Id.*; *see also State v. Kevil*, 111 Ariz. 240, 242-44, 527 P.2d 285,

[2]Maikowski also cites two federal cases. *See United States v. Robinson*, 583 F.3d 1265, 1275 (10th Cir. 2009) (trial court erred in refusing defendant access to witness's mental-health records containing information material to defense); *United States v. Lindstrom*, 698 F.2d 1154, 1164-66 (11th Cir. 1983) (same). But these cases are not binding on this court, and we further find them distinguishable from the situation at hand. The mental-health records at issue in the federal cases contained relevant information about the witnesses' ability to perceive events, including long histories of mental illness and delusion, *Lindstrom*, 698 F.2d at 1161-62, 1166-67, and hallucination and heavy drug use, *Robinson*, 583 F.3d at 1271-72, 1274-75. Here, by contrast, the trial court determined C.'s health records contained no exculpatory or impeaching evidence. Moreover, in the federal cases, cross-examination on issues related to the witnesses' mental health was either severely limited, *Lindstrom*, 698 F.2d at 1162-63, or completely disallowed, *Robinson*, 583 F.3d at 1274, so the extent of the witnesses' respective conditions was not conveyed meaningfully to the juries. But here, Maikowski was permitted to cross-examine C. on the "whole litany" related to her mental-health condition and medications. We therefore do not find *Lindstrom* or *Robinson* persuasive on the facts of this case.

287-89 (1974) (denial of access to medical records not abuse of discretion where defense permitted to cross-examine witness about mental illness, attendant medications, and alcohol abuse). Accordingly, we find no abuse of discretion in the trial court's refusal to provide C's. mental health records to Maikowski.

Jury Instruction

¶14 Maikowski next contends the trial court erroneously instructed the jury on the offense of attempted second-degree murder, arguing the instruction allowed the jury to convict him under theories of liability that do not exist in Arizona. Maikowski entered only a general objection to instructing the jury on any lesser-included offenses of attempted first-degree murder and acknowledges he did not make this specific argument to the trial court, thus conceding he has forfeited review for all but fundamental, prejudicial error.[3] *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Consequently, Maikowski "must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶15 Maikowski contends that although the crime of attempted second-degree murder can exist if predicated on a valid theory of liability, the jury in his case was instructed on impermissible theories, which led to his conviction. "To instruct a jury on a

[3]We note Maikowski initially requested the instruction he now challenges, but his trial objection satisfies us he was not seeking to "inject error in the record . . . [in order to] profit from it on appeal," and we therefore do not apply the invited-error doctrine. *State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1988); *see also State v. Lucero*, 223 Ariz. 129, ¶ 18, 220 P.3d 249, 255 (App. 2009) ("'[E]xtreme caution must be exercised in permitting' an application of the [invited-error] doctrine unless the facts clearly show that the error was actually invited by the appellant."), *quoting State v. Smith*, 101 Ariz. 407, 409, 420 P.2d 278, 280 (1966).

non-existent theory of liability is fundamental error." *State v. Ontiveros*, 206 Ariz. 539, ¶ 17, 81 P.3d 330, 333 (App. 2003); *see State v. Rutledge*, 197 Ariz. 389, n.7, 4 P.3d 444, 447 n.7 (App. 2000); *State v. Curry*, 187 Ariz. 623, 627-28, 931 P.2d 1133, 1137-38 (App. 1996). The crime of attempted second-degree murder "requires either the intention or the knowledge that one's conduct will cause the death of the victim." *Ontiveros*, 206 Ariz. 539, ¶ 10, 81 P.3d at 332. "[I]t is not enough . . . that a person knows that his conduct will cause 'serious physical injury.'" *Id.* Likewise, "for a conviction of reckless second degree murder, no intent to achieve a result need be shown"; therefore, "there can be no attempt to commit such a crime." *Curry*, 187 Ariz. at 627, 931 P.2d at 1137.

¶16 The trial court instructed the jury:

> The crime of attempted second degree murder requires proof of any one of the following:
>
> 1. The defendant attempted to intentionally cause the death of another person; or
>
> 2. The defendant attempted to cause the death of another person by conduct which he knew would cause death or serious physical injury; or
>
> 3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct which created a grave risk of death.

Maikowski asserts, and the state concedes, that portions of this instruction are erroneous because they instruct on theories of liability not recognized in Arizona. The instruction's second enumerated theory allowed the jury to convict Maikowski even if it found he only intended or knew his conduct would cause serious physical injury rather than death. Likewise, the third theory allowed a conviction even if the jury found Maikowski only acted recklessly and had neither intent nor knowledge his conduct would cause death.

Because the instruction allowed the jury to consider nonexistent theories of liability, giving that instruction was fundamental error. *See Ontiveros*, 206 Ariz. 539, ¶¶ 17, 19, 81 P.3d at 333-34; *Curry*, 187 Ariz. at 627-28, 931 P.2d at 1137-38.

¶17 Having found fundamental error, we next consider whether Maikowski has carried his burden of showing prejudice. "Fundamental error review involves a fact-intensive inquiry, and the showing required to establish prejudice therefore differs from case to case." *Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608. The state, citing *State v. Salazar*, 216 Ariz. 316, ¶ 12, 166 P.3d 107, 110 (App. 2007), argues that "to show prejudice, [Maikowski] must show that a reasonable jury, absent the error, could have reached a different result." But *Salazar* states the burden for showing prejudice pursuant to the erroneous admission of evidence. *See id.* The showing required for the provision of an erroneous jury instruction is set forth in *State v. King*, in which our supreme court held that a defendant has shown prejudice "when the unobjected-to error may have 'contribut[ed] to or significantly affect[ed] the verdict.'" 158 Ariz. 419, 424, 763 P.2d 239, 244 (1988), *quoting State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981) (alterations in *King*); *see also Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608 ("The showing a defendant must make [to establish prejudice] varies, depending upon the type of error that occurred and the facts of a particular case."); *Ontiveros*, 206 Ariz. 539, ¶ 17, 81 P.3d at 333 (We "focus[] on the potential that [the defendant] may have been convicted on a non-existent theory of liability.").

¶18 Maikowski contends the jury may have convicted him of attempted second-degree murder without necessarily finding he had intended to kill S. In support of this

argument, he refers to the interrogatory included with the form of verdict in which the jury indicated it had found beyond a reasonable doubt that "the offense involved the intentional or knowing infliction of serious physical injury upon another person." Maikowski maintains the erroneously instructed jury might have convicted him based on the unsound theory "that [he had] attempted to cause the death of another person by conduct . . . he knew would cause . . . serious physical injury."

¶19 The state counters that the instruction was not prejudicial because overwhelming evidence supported conviction on the intent-to-kill theory, including that Maikowski had inflicted life-threatening injuries and his statements to C. immediately after the assault that "he could finish [S.] off . . . [a]nd bury him in the river." Although the act of striking S. with a hatchet "may support an inference that the act was committed with intent or knowledge" that it would cause death, and although there is substantial evidence to support the conviction on an intent theory, "our inquiry does not end with these conclusions." *Ontiveros*, 206 Ariz. 539, ¶ 16, 81 P.3d at 333. Rather, "[o]ur concern focuses on the potential that [Maikowski] may have been convicted on a non-existent theory of liability." *Id.* ¶ 17.

¶20 The jury in this case might have concluded Maikowski had not intended to kill or acted with knowledge his conduct would cause death, but rather that he had intended or known his actions would cause serious physical injury. S. did not remember the assault, and there were no other eyewitnesses. The jury heard testimony that undermined the credibility of the only witness to Maikowski's actions immediately after the assault: C. had been drinking earlier that evening, had not been taking medication

prescribed for a mental-health condition, and had used crack cocaine that night. Thus, the jury could have rejected inferences of Maikowski's intent supported by her testimony. Moreover, Maikowski's statements the state relies on were made after the assault already had occurred. Although the jury could conclude they were indicative of Maikowski's mental state at the time of the assault, it also could have instead concluded they showed Maikowski had formed the intent to kill only after he had reflected on the gravity and possible consequences of the already-completed assault. Given this evidence, the jury could have determined that in committing the assault Maikowski had only intended or known his conduct would seriously injure S. rather than kill him and thus may have convicted him based on the erroneous instruction. *See Ontiveros*, 206 Ariz. 539, ¶¶ 16-18, 81 P.3d at 333-34.

¶21 The state correctly points out the instruction should be interpreted in context with the state's closing argument, which "did not discuss the lesser included offense of [attempted] second-degree murder at all," but rather only argued Maikowski had committed attempted first-degree murder on the theory he had intended to kill S. We do not evaluate jury instructions out of context, and "[c]losing arguments of counsel may be taken into account when assessing the[ir] adequacy." *State v. Bruggeman*, 161 Ariz. 508, 510, 779 P.2d 823, 825 (App. 1989). Here, however, any remedial impact the state's closing argument had on the erroneously instructed jury is countervailed by the fact the jury obviously rejected the state's argument by electing to convict Maikowski of a lesser-included offense that the state admittedly did not discuss. Additionally, any conjecture that the closing argument had a curative impact is further undermined by the

interrogatory showing that the jury found "the offense involved the intentional or knowing infliction of serious physical injury."

¶22 For all these reasons, we cannot say the instruction did not contribute to or significantly affect the verdict. *See King*, 158 Ariz. at 424, 763 P.2d at 244. Consequently, we must vacate Maikowski's conviction of attempted second-degree murder and remand for a new trial on that count.

Disposition

¶23 Based on the foregoing, Maikowski's convictions and sentences are affirmed in part and vacated in part, and this matter is remanded for further proceedings consistent with this decision.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge